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American Jurisprudence, Second Edition | May 2021 Update

Federal Tort Claims Act

Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; and John A. Gebauer, J.D.

VII. Actions Under Federal Tort Claims Act

C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

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35A Am. Jur. 2d Federal Tort Claims Act § 146

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Federal Tort Claims Act

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VII. Actions Under Federal Tort Claims Act

C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

1. In General

§ 146. Certification by Attorney General that employee acted in scope of employment in federal tort claim action, generally; removal to federal court

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[When Has Federal Employee Acted Within Scope of Employment for Purposes of Westfall Act, 28 U.S.C.A. s2679, Permitting Substitution of United States as Defendant in Action Asserting Intentional Tort Not Involving Personal Injury or Death, 14 A.L.R. Fed. 2d 251](#)

[When Has Federal Employee Acted Within Scope of Employment for Purposes of Westfall Act, 28 U.S.C.A. s 2679, Permitting Substitution of United States as Defendant in Action for Negligence or Other Nonintentional Tort or for Violation of State Statute, 12 A.L.R. Fed. 2d 649](#)

[When Has Federal Employee Acted Within Scope of Employment for Purposes of Westfall Act, 28 U.S.C.A. sec. 2679, Permitting Substitution of United States as Defendant in Action Asserting Intentional Tort Involving Personal Injury or Death or Threats Thereof, 7 A.L.R. Fed. 2d 179](#)

[Construction and application of Westfall Act provision providing federal employee immunity from ordinary tort suits if attorney general certifies that employee was acting within scope of office or employment at time of incident out of which claim arose \(28 U.S.C.A. sec. 2679\(d\)\), 120 A.L.R. Fed. 95](#)

To give effect to the Federal Tort Claims Act (FTCA), when a federal employee is sued for a wrongful or negligent act, the United States Attorney General is empowered to certify that the employee was acting within the scope of its office or employment at the time of the incident out of which the claim arose.¹ Upon certification by the Attorney General that a defendant employee was acting within the scope of its federal office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court will be deemed

an action against the United States under the provisions of the FTCA and all references thereto, and the United States will be substituted as the party defendant.²

Upon certification by the Attorney General that a defendant employee was acting within the scope of its federal office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a state court will be removed without bond at any time before trial by the Attorney General to the United States district court for the district and division embracing the place in which the action or proceeding is pending,³ regardless of diversity of citizenship between the plaintiff and the defendant.⁴ The superior court of the District of Columbia is a state court within the meaning of this provision.⁵ Such action or proceeding will be deemed to be an action or proceeding brought against the United States under the provisions of the FTCA and all references thereto, and the United States will be substituted as the party defendant.⁶ Upon substitution, the employee is dismissed from the action.⁷ The FTCA authorizes the substitution of the United States as the defendant in an action brought against federal employees for damages for harms caused in the scope of their employment.⁸ When putative federal employees are not the only defendants, the entire action, not just the claims against the United States, will be removed to federal court.⁹

Such certification and substitution provisions are designed to immunize covered federal employees, not simply from liability, but from suit.¹⁰ An evidentiary hearing is not required to determine whether a federal employee was acting within the scope of its employment at the time of the incident out of which the claim arose,¹¹ and certification is proper even when a federal employee charged with misconduct asserts, and the government determines, that the incident or episode in the suit never occurred.¹² The Attorney General may validly certify that a federal employee named as a defendant in a tort action was acting within the scope of its employment, so as to warrant the substitution of the United States as the defendant in such action, even where the Attorney General's certification rests on an understanding of facts that differ from the plaintiff's allegations.¹³

Observation:

Where the Attorney General moves to substitute the United States as a defendant in a civil tort action, this motion should be construed as certification by the Attorney General that the defendant federal employee was acting within the scope of its office or employment at the time of the incident out of which the claim arose.¹⁴ In other words, a request for substitution by the United States as the sole defendant in a FTCA action is in substance, if not form, a certification that the federal employee was within the scope of its employment.¹⁵

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Footnotes

¹ Booten v. U.S., 233 F. Supp. 2d 227 (D. Mass. 2002).

² 28 U.S.C.A. § 2679(d)(1).

³ 28 U.S.C.A. § 2679(d)(2).

⁴ Andelman v. Getz, 268 F. Supp. 782 (S.D. Fla. 1967).

⁵ Wasserman v. Rodacker, 557 F.3d 635 (D.C. Cir. 2009).

⁶ 28 U.S.C.A. § 2679(d)(2).

⁷ U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Virginia, LLC, 899 F.3d 236 (4th Cir. 2018); Aviles-Wynkoop v. Neal, 978 F. Supp. 2d 15 (D.D.C. 2013).

8 Hui v. Castaneda, 559 U.S. 799, 130 S. Ct. 1845, 176 L. Ed. 2d 703 (2010).

9 Dillon v. State of Miss. Military Dept., 23 F.3d 915 (5th Cir. 1994).

10 Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

11 Sanders v. Williams, 160 F. Supp. 2d 1191 (D. Colo. 2001), aff'd, 34 Fed. Appx. 675 (10th Cir. 2002).

12 Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

13 Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

14 Krueger v. Saiki, 820 F. Supp. 467 (W.D. Mo. 1993), order aff'd, 19 F.3d 1285 (8th Cir. 1994).

15 Nwaokocha v. Sadowski, 369 F. Supp. 2d 362 (E.D. N.Y. 2005).

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VII. Actions Under Federal Tort Claims Act

C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

1. In General

§ 147. Effect and review of scope-of-employment certification by Attorney General in federal tort claim action against employee

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West's Key Number Digest

West's Key Number Digest, [United States](#) 959(1)

The certification by the United States Attorney General, that a defendant employee was acting within the scope of its federal government office or employment at the time of the incident out of which the claim arose, will conclusively establish scope of office or employment for purposes of removal of the civil action commenced in state court to federal court, under the Federal Tort Claims Act.¹ The Attorney General's certification that a federal employee was acting within the scope of its employment, however, does not conclusively establish as correct the substitution of the United States as defendant in place of the employee in the civil action,² but rather is provisional and subject to judicial review.³ In other words, the Attorney General's certification is conclusive for purposes of removal of the action from state court to federal court, but the substitution and conversion consequences of it are subject to judicial review.⁴

A plaintiff challenging a statutory certification that a federal employee was acting within the scope of its employment when a tort claim against the employee arose, and substitution of the United States as defendant in that action, must present evidence from which a district court could reasonably find that the defendant-employee acted outside the scope of its employment, and, if the plaintiff produces such evidence, a district court must conduct an evidentiary hearing in order to determine the propriety of the certification and substitution.⁵

A state court may remove a tort action against a government employee to an United States district court without substituting the United States for the government employee when the state court concludes that the employee was not acting within the scope of its employment.⁶

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Footnotes

¹ 28 U.S.C.A. § 2679(d)(2).

² Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995); Council on American Islamic Relations v. Ballenger, 444 F.3d 659, 14 A.L.R. Fed. 2d 795 (D.C. Cir. 2006); Coyne v. U.S., 233 F. Supp. 2d 135 (D. Mass. 2002); Meagher v. Heggemeier, 513 F. Supp. 2d 1083 (D. Minn. 2007).

³ U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Virginia, LLC, 899 F.3d 236 (4th Cir. 2018); Nogueras-Cartagena v. U.S., 172 F. Supp. 2d 296 (D.P.R. 2001), aff'd, 75 Fed. Appx. 795 (1st Cir. 2003).

⁴ Bancourt v. McNamara, 370 F. Supp. 2d 1 (D.D.C. 2004), decision aff'd, 445 F.3d 427 (D.C. Cir. 2006).

⁵ Buchanan v. U.S., 102 F. Supp. 3d 935 (W.D. Ky. 2015).

⁶ Whytosek v. Rademan, 903 F. Supp. 842 (E.D. Pa. 1995).

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

1. In General

§ 148. Refusal of Attorney General to certify scope of employment in federal tort claim action against employee; petition for judicial certification

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [United States](#) 959(1)

In the event that the United States Attorney General has refused to certify scope of office or employment in connection with a tort action against an employee of the federal government, the employee may, at any time before trial, petition the court to find and certify that the employee was acting within the scope of its office or employment.¹ In the absence of a certification by the Attorney General, the court may certify an employee's scope of office or employment so that the United States can be substituted as the party defendant in lieu of the federal employee in the action.²

A copy of the petition for certification must be served upon the United States in accordance with the provisions of the Federal Rules of Civil Procedure.³ An employee seeking review of the Attorney General's denial of scope-of-employment certification bears the burden of presenting evidence and disproving the Attorney General's decision by a preponderance of the evidence.⁴

If a scope-of-employment certification is made by the court, the action or proceeding will be deemed to be an action or proceeding brought against the United States under the provisions of the Federal Tort Claims Act and all references thereto, and the United States will be substituted as the party defendant.⁵ In the event the petition is filed in a civil action or proceeding pending in a state court, the action or proceeding may be removed without bond by the Attorney General to the United States district court for the district and division embracing the place in which it is pending.⁶

Observation:

Only a federal employee may challenge the Attorney General's refusal to certify; a tort plaintiff has no such right.⁷

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Footnotes

¹ [28 U.S.C.A. § 2679\(d\)\(3\)](#).

² [Nwaokocha v. Sadowski](#), 369 F. Supp. 2d 362 (E.D. N.Y. 2005).

³ [28 U.S.C.A. § 2679\(d\)\(3\)](#), referring to [Fed. R. Civ. P. 4\(d\)\(4\)](#).

⁴ [Allender v. Scott](#), 379 F. Supp. 2d 1206 (D.N.M. 2005).

⁵ [28 U.S.C.A. § 2679\(d\)\(3\)](#).

⁶ [28 U.S.C.A. § 2679\(d\)\(3\)](#).

⁷ [Booten v. U.S.](#), 233 F. Supp. 2d 227 (D. Mass. 2002).

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

1. In General

§ 149. Manner of proceeding after certification that employee acted in scope of employment in federal tort claim action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [United States](#)  959(1), 959(4)

Upon certification by the United States Attorney General, or by the court in the case of the Attorney General's refusal to certify, that a defendant employee was acting within the scope of its federal office or employment at the time of the incident out of which the claim arose, any action or proceeding commenced upon such claim will proceed in the same manner as any action against the United States filed pursuant to the Federal Tort Claims Act and will be subject to the limitations and exceptions applicable to those actions.¹

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¹ [28 U.S.C.A. § 2679\(d\)\(4\).](#)

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

1. In General

§ 150. Time for removal of state court action to federal court in federal tort claim action against employee

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West's Key Number Digest

West's Key Number Digest, [United States](#) 965

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[Removal from, or remand to, state court in Federal Tort Claims Act proceeding involving motor vehicle driver, under 28 U.S.C.A. sec. 2679\(d\), 41 A.L.R. Fed. 288](#)

Removal of a tort action against a federal government employee from state court to federal court by the United States Attorney General may occur after the applicable statute of limitations has run.¹ The United States therefore does not waive its right to remove a tort action against a government employee by not exercising such right until after expiration of the statute of limitations for filing an administrative claim.²

A civil action against a federal government employee commenced in a state court may be removed at any time before trial by the Attorney General to federal court upon the Attorney General's certification that the federal employee was acting within the scope of his or her office or employment at the time of the incident out of which the claim arose.³ In other words, the removal of a state tort action to federal court by the Attorney General remains a viable option until the start of the state trial by the Attorney General certifying the status of the named defendant as a federal employee,⁴ and the removal of the action is timely as long as it occurs some time prior to trial.⁵ Removal is timely achieved before trial even after the plaintiff obtains a default judgment in state court against a government employee, if state law provides that after the entry of a default judgment a defendant may still make a request for a trial on the issue of damages, and in such a case a federal court has the power to set aside the default judgment.⁶

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Footnotes

¹ McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980).

² Reilly v. Peterson, 435 F. Supp. 862 (S.D. N.Y. 1977).

³ § 146.

⁴ Celestine v. Mount Vernon Neighborhood Health Center, 403 F.3d 76 (2d Cir. 2005).

⁵ McLaurin v. U.S., 392 F.3d 774 (5th Cir. 2004).

⁶ Kizer v. Sherwood, 311 F. Supp. 809 (M.D. Pa. 1970).

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

1. In General

§ 151. Removal of state court action to federal court in federal tort claim action against employee based on removable counterclaim

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Forms

[Federal Procedural Forms § 63:49](#) (Third-party practice; joinder; counterclaims and cross-claims)

An entire action against a federal government employee can be removed to federal court from state court even though the removable cause of action is asserted as a counterclaim against the employee and the ordinarily nonremovable cause of action is brought by the federal employee against the defendant asserting the counterclaim.¹

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¹ [Gianella v. Keels](#), 261 F. Supp. 662 (S.D. Fla. 1966).

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

1. In General

§ 152. Certification that contractor acted within scope of employment under atomic weapons testing program

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West's Key Number Digest

West's Key Number Digest, [United States](#) 964(1), 965

Pursuant to the Atomic Testing Liability Act, a contractor against whom there is brought a civil action or proceeding for injury, loss of property, personal injury, or death, due to exposure to radiation based on acts or omissions by the contractor in carrying out an atomic weapons testing program under a contract with the United States, must promptly deliver all processes served upon that contractor to the United States Attorney General.¹ Upon certification by the Attorney General that the suit against the contractor is within the provisions of the Atomic Testing Liability Act, a civil action or proceeding commenced in a state court will be removed without bond at any time before trial by the Attorney General to the United States district court for the district and division embracing the place where it is pending and the proceedings will be deemed a tort action brought against the United States under the provisions of the Federal Tort Claims Act.² For purposes of removal, the Attorney General's certification establishes contractor status conclusively.³

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Footnotes

¹ [50 U.S.C.A. § 2783\(c\)](#).

² [50 U.S.C.A. § 2783\(c\)](#).

³ [50 U.S.C.A. § 2783\(c\)](#).

§ 152. Certification that contractor acted within scope of..., 35A Am. Jur. 2d...

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

2. Challenge to or Withdrawal of Certification, and Action After Determination of Incorrect Certification

§ 153. Challenge to certification that employee acted in scope of employment in federal tort claim action against employee; substitution of defendant

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West's Key Number Digest

West's Key Number Digest, United States  965

The Attorney General's certification that a federal employee was acting within scope of its office or employment at the time of the incident out of which the tort claim arose conclusively establishes removal jurisdiction.¹ However, a plaintiff may challenge the United States Attorney General's scope-of-employment certification providing a federal government employee absolute immunity from tort claims arising out of acts undertaken in the course of its employment,² and the subsequent substitution of the United States as the party defendant in an action brought against a government employee,³ after removal of the claim from state court to federal court.⁴ A plaintiff suing a federal government employee, once in federal court, may challenge the government's substitution of itself as defendant in the action.⁵

A certification by the Attorney General, that a federal government employee was acting within the scope of its employment when the alleged wrongdoing was committed, is given *prima facie* effect.⁶ The district court reviewing the certification does so *de novo*.⁷ A plaintiff challenging the certification and subsequent substitution of parties must come forward with specific facts rebutting the certification,⁸ and must allege facts that, if true, would establish that the employee acted outside the scope of its employment.⁹ A plaintiff has the burden of proof to show that the defendant employee was not acting within the scope of employment,¹⁰ and such burden must be met by a preponderance of the evidence.¹¹

Where a plaintiff comes forward with competent evidence which would permit a conclusion contrary to the certification that the defendant employee was acting within the scope of its employment, the defendant and the government are entitled to an evidentiary hearing, at which the district court will resolve all issues of law and fact relevant to the issue and find whether the defendant did or did not act within the scope of its employment.¹² Where a hearing is held to determine whether the defendant was an employee of the United States and acting within the scope of its employment, the exclusion of the plaintiff from the hearing cannot be regarded as harmless error on the basis that the plaintiff was permitted to make written submissions.¹³

The district court reviews scope-of-employment determinations according to the principles of respondeat superior of the state

in which the alleged tort occurred.¹⁴

Observation:

At the time the district court reviews the Attorney General's certification, the plaintiff has no right to a jury trial.¹⁵ However, as part of the process of determining whether certification is proper, it will sometimes be advisable for the trial court to permit limited discovery or conduct an evidentiary hearing to resolve competing factual claims concerning the scope-of-employment issue.¹⁶

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Footnotes

¹ [Bolton v. United States](#), 946 F.3d 256 (5th Cir. 2019).

² [U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Virginia, LLC](#), 899 F.3d 236 (4th Cir. 2018); [Wuterich v. Murtha](#), 562 F.3d 375 (D.C. Cir. 2009).

³ [Larsen v. Frederiksen](#), 277 F.3d 1040 (8th Cir. 2002).

⁴ [Grantham v. Durant](#), 471 F. Supp. 2d 1069 (D. Nev. 2006).

⁵ [Singleton v. U.S.](#), 277 F.3d 864, 2002 FED App. 0029P (6th Cir. 2002) (overruled on other grounds by, [Hawver v. U.S.](#), 808 F.3d 693 (6th Cir. 2015)).

⁶ [Taylor v. Clark](#), 821 F. Supp. 2d 370 (D.D.C. 2011); [Jenkins v. University of Minnesota](#), 50 F. Supp. 3d 1084, 315 Ed. Law Rep. 336 (D. Minn. 2014); [Meagher v. Heggemeier](#), 513 F. Supp. 2d 1083 (D. Minn. 2007).

⁷ [Omnipol, a.s.v. Worrell](#), 421 F. Supp. 3d 1321 (M.D. Fla. 2019).

⁸ [Larsen v. Frederiksen](#), 277 F.3d 1040 (8th Cir. 2002); [Dickson v. Wojcik](#), 22 F. Supp. 3d 830 (W.D. Mich. 2014).

⁹ [Taylor v. Clark](#), 821 F. Supp. 2d 370 (D.D.C. 2011); [Konarski v. Brown](#), 293 F. Supp. 2d 70 (D.D.C. 2003), aff'd, 2004 WL 1249346 (D.C. Cir. 2004).

¹⁰ [Khatami v. Compton](#), 844 F. Supp. 2d 654 (D. Md. 2012); [Nogueras-Cartagena v. U.S.](#), 172 F. Supp. 2d 296 (D.P.R. 2001), aff'd, 75 Fed. Appx. 795 (1st Cir. 2003); [Robles v. Beaufort Memorial Hosp.](#), 482 F. Supp. 2d 700 (D.S.C. 2007).

¹¹ [Bancoult v. McNamara](#), 370 F. Supp. 2d 1 (D.D.C. 2004), decision aff'd, 445 F.3d 427 (D.C. Cir. 2006); [Castellanos v. Pfizer, Inc.](#), 555 F. Supp. 2d 1343 (S.D. Fla. 2008); [Khatami v. Compton](#), 844 F. Supp. 2d 654 (D. Md. 2012).

¹² [Melo v. Hafer](#), 13 F.3d 736 (3d Cir. 1994).

¹³ [Wang v. U.S.](#), 947 F.2d 1400 (9th Cir. 1991).

¹⁴ [Wuterich v. Murtha](#), 562 F.3d 375 (D.C. Cir. 2009); [Grantham v. Durant](#), 471 F. Supp. 2d 1069 (D. Nev. 2006).

¹⁵ [Osborn v. Haley](#), 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

¹⁶ [U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Virginia, LLC](#), 899 F.3d 236 (4th Cir. 2018).

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

2. Challenge to or Withdrawal of Certification, and Action After Determination of Incorrect Certification

§ 154. Withdrawal of certification that employee acted in scope of employment in federal tort claim action against employee

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West's Key Number Digest

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After a tort action against a federal government employee has been removed to the United States district court pursuant to the United States Attorney General's scope-of-employment certification, a motion by government counsel to withdraw the certification will be granted only if new evidence presented warrants the withdrawal.¹ Once a scope-of-employment certification has been so withdrawn, the certification ceases to have conclusive effect for purposes of the substitution of parties.²

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Footnotes

¹ [Stephan v. Madison](#), 223 F. Supp. 256 (E.D. N.Y. 1963).

² [Jamison v. Wiley](#), 14 F.3d 222 (4th Cir. 1994).

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C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

2. Challenge to or Withdrawal of Certification, and Action After Determination of Incorrect Certification

§ 155. Resubstitution of original employee as defendant in federal tort claim action against employee

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West's Key Number Digest

West's Key Number Digest, [United States](#) 965, 967

If a United States district court determines, after a tort action brought against a federal government employee has been removed from state court to federal court, that the United States Attorney General's certification that the federal employee was acting within the scope of employment at the time of the incident out of which the claim arose was incorrect, it may resubstitute the federal employee for the United States as the defendant in the action for the purpose of trial.¹ Where a district court rejects the Attorney General's scope-of-employment certification, it thereby rejects the substitution of the United States as the defendant for the employee in the tort action, and it will resubstitute the original employee defendant for the United States in the action.² The district court is required to retain jurisdiction of the case,³ and will assess the claims pursuant to state tort law.⁴

A district court's order resubstituting individual defendants in a suit, after the United States was substituted for them following the Attorney General's certification that they were acting within the scope of their employment, is appealable to a court of appeals, since it effectively denies the federal employee's claim to absolute immunity.⁵ The United States, along with the individual federal employees named as defendants in the suit, have standing to appeal immediately from the court order rejecting the certification and denying the substitution of the United States as defendant in the suit.⁶ The order is reviewable under the collateral order doctrine, since it conclusively decides an important, contested issue separate from the merits of the cause of action, and would be effectively unreviewable later in the litigation.⁷

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Footnotes

¹ [Osborn v. Haley](#), 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

² Garcia v. U.S., 88 F.3d 318 (5th Cir. 1996).

³ Garcia v. U.S., 88 F.3d 318 (5th Cir. 1996); Singleton v. U.S., 277 F.3d 864, 2002 FED App. 0029P (6th Cir. 2002) (overruled on other grounds by, Hawver v. U.S., 808 F.3d 693 (6th Cir. 2015)).

⁴ Singleton v. U.S., 277 F.3d 864, 2002 FED App. 0029P (6th Cir. 2002) (overruled on other grounds by, Hawver v. U.S., 808 F.3d 693 (6th Cir. 2015)).

⁵ Aliota v. Graham, 984 F.2d 1350 (3d Cir. 1993); Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990).

⁶ Velez-Diaz v. Vega-Irizarry, 421 F.3d 71 (1st Cir. 2005).

⁷ Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

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American Jurisprudence, Second Edition | May 2021 Update

Federal Tort Claims Act

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VII. Actions Under Federal Tort Claims Act

C. Scope of Employment Certification, Conversion of Action, and Removal of State Court Action to Federal Court

2. Challenge to or Withdrawal of Certification, and Action After Determination of Incorrect Certification

§ 156. Remand to state court in federal tort claim action against employee

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[Removal from, or remand to, state court in Federal Tort Claims Act proceeding involving motor vehicle driver, under 28 U.S.C.A. sec. 2679\(d\), 41 A.L.R. Fed. 288](#)

Once the United States Attorney General certifies that a federal government employee named as a defendant in a state court tort action was acting within the scope of its employment, and the cause of action is removed to federal court based on that certification, the district court has no authority to return the case to the state court on the ground that the Attorney General's certification was unwarranted.¹ Where, however, the Attorney General has refused to certify an employee's scope of office or employment, and the issue of scope of employment is certified on petition to the court, and the district court determines, in considering the petition, that the employee was not acting within the scope of its office or employment, the action or proceeding must be remanded to the state court.²

If a state court action against a federal government employee is removed to federal district court after certification and is joined with an otherwise nonremovable action, the federal district court has the discretion under the general removal statute³ to retain jurisdiction of the entire matter or to remand to the state court for its determination those matters which would not be removable if sued upon alone.⁴

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Footnotes

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¹ [Osborn v. Haley](#), 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).
As to the Attorney General's certification conclusively establishing scope of employment for purposes of removal, see
[§ 147](#).

² [28 U.S.C.A. § 2679\(d\)\(3\)](#).

³ [28 U.S.C.A. § 1441\(c\)](#).

⁴ [Gianella v. Keels](#), 261 F. Supp. 662 (S.D. Fla. 1966); [Darnell v. Starks](#), 258 F. Supp. 31 (D. Or. 1966).

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